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No. 97-769

In The Supreme Court of the United States

OCTOBER TERM 1997

LOUDOUN COUNTY BOARD OF EDUCATION,

Petitioner,

v.

MARK HARTMANN, a minor by his parents and next friends, Roxanna and Joseph Hartmann, and ROXANNA AND JOSEPH HARTMANN,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY TO BRIEF IN OPPOSITION TO CONDITIONAL CROSS-PETITION

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QUESTIONS PRESENTED

1. Whether a school district has an obligation under IDEA to offer educational services to a disabled student once the student moves to another jurisdiction and receives a free appropriate public education there.

2. Whether a student's move to another jurisdiction moots the issue of the appropriateness of the student's IEP which was proposed prior to his relocation.

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED i

TABLE OF CITATIONS iii

I. THIS CASE IS MOOT DUE TO MARK'S MOVE TO MONTGOMERY COUNTY 2

A. ESTABLISHMENT OF RESIDENCE IN ANOTHER SCHOOL DISTRICT MOOTS ANY REVIEW OF THE APPROPRIATENESS OF THE EDUCATION IN LOUDOUN 3

B. MARK HARTMANN IS NOT A RESIDENT OF BOTH MONTGOMERY COUNTY AND LOUDOUN COUNTY . 6

C. THE HARTMANNS HAVE NOT SOUGHT EDUCATIONAL SERVICES FROM LOUDOUN 6

D. THE HARTMANNS HAVE NOT PRESENTED EQUITABLE GROUNDS TO AVOID APPLICATION OF THE MOOTNESS DOCTRINE 7

CONCLUSION 8

TABLE OF CITATIONS

PAGE

Cases

Daniel R.R. v. State Board of Education, 874 F.2d 1036 (5th Cir. 1989) 5

Honig v. Doe, 484 U.S. 305 (1988) 3, 4

Lee v. Biloxi School District, 963 F.2d 837 (5th Cir. 1992) 5

Sacramento v. Holland, 14 F.3d 1398 (9th Cir. 1994) cert. denied, 114 S. Ct. 2679 (1994) 5

Statutes

20 U.S.C. §§ 1400, et seq., Individuals with Disabilities Education Act ("IDEA") 3, 6, 7

20 U.S.C. § 1414 3

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For reasons stated in the opening brief and in the following reply brief, the Conditional Cross-Petition submitted by the Loudoun County Board of Education

("Loudoun") should be granted in the event this Court grants the petition submitted by Mark Hartmann, Roxanna Hartmann and Joseph Hartmann ("the Hartmanns").

I. THIS CASE IS MOOT DUE TO MARK'S MOVE TO MONTGOMERY COUNTY

The Hartmanns argue that this case is capable of repetition yet evading review in order to avoid the application of the mootness doctrine. This assertion is erroneous because it overlooks the fact that in contention is the review of an expired 1994-95 individualized educational plan ("IEP"). The Hartmanns have not sought the development of subsequent IEPs by Loudoun and instead have had IEPs developed by Montgomery County. There is no evidence in the record that Loudoun would automatically offer Mark Hartmann the same education program as previously if he were to re-enroll in the Loudoun County Public Schools today. Because the parents have not requested services since December 1994, there is no current pending placement for this Court to review.

The argument is also erroneous because it ignores the fact that for the past two and one-half years, Mark has received the free appropriate public education which the Hartmanns desired for Mark. Thus, the Hartmanns have not had any dispute over Mark's educational services since December 1994. These facts make this case moot and not worthy of this Court's consideration.

A. ESTABLISHMENT OF RESIDENCE IN ANOTHER SCHOOL DISTRICT MOOTS ANY REVIEW OF THE APPROPRIATENESS OF THE EDUCATION IN LOUDOUN.

The Hartmanns argue that the case is moot because the conduct originally complained of is capable of repetition yet evading review. See Cross-Respondents' Brief pp. 2-7, citing Honig v. Doe, 484 U.S. 305, 318 (1988). While this statement of law is correct, it is not appropriately cited in the instant case. Mark Hartmann last attended the Loudoun County Public Schools in December, 1994. The last IEP developed for him by Loudoun County was developed in May 1994. Since that time, the Hartmanns have sought no educational services from Loudoun for Mark. Because no services have been requested from Loudoun in the intervening years due to Mark's residency and receipt of an appropriate education in Montgomery County, Virginia, Loudoun has not been requested to develop any subsequent IEPs for Mark.

The Hartmanns whole argument on mootness presupposes that Loudoun would automatically re-offer Mark a placement in an autistic program rather than considering him for inclusive services if he were to re-enroll. This supposition is not based on any facts in the record and certainly does not present a continuing live controversy. It cannot be assumed that because Loudoun offered placement in an autism program in the 1994-95 school year, that for the 1997-98 school year, it would offer an identical placement to Mark. The IDEA requires that IEPs be developed and reviewed annually. 20 U.S.C.

§ 1414(a)(4). It would be contrary to this dictate to assume that an identical IEP would be offered to Mark Hartmann three and a half years after the development of the May 1994 IEP and without regard to any changes in Mark's educational needs that would require modifications to his educational programming.

The Hartmanns attempt to classify this case as a dispute over "philosophical differences." They argue that this philosophical disagreement establishes this case as a continuing controversy. This argument is without foundation. There is no philosophical difference between Loudoun and the Hartmanns regarding inclusion. It was noted in the record that Loudoun had some model inclusion programs within its school division. Loudoun's experts testified that Mark would be reintegrated into regular classes just as soon as his behaviors improved. Thus, there are no continuing philosophical differences between Loudoun and the Hartmanns. Mark's placement and the amount of regular education instruction he received will be determined each year based on his educational needs during the year.

The cases cited by the Hartmanns in their brief do not support finding that this case is a continuing controversy. The Hartmanns cite Honig v. Doe, supra. In that case, the mootness doctrine was avoided even though the student had moved from the jurisdiction of the local school district because the student was contesting the application of a state-wide statute governing discipline of students with disabilities. There is no such contention of a state-wide application of a policy in this case that will affect Mark whether he is enrolled in Montgomery or in Loudoun

County. The Hartmanns also cite Daniel R.R. v. State Board of Education, 874 F.2d 1036 (5th Cir. 1989). In that case, however, a conclusion was also made that there could be a continuing controversy capable of repetition in another school division. In the instant case, however, Mark's situation was not capable of repetition because for three and a half years he has received inclusion services in Montgomery County. Thus, whatever controversy existed in this case ended when Mark began receiving the services his parents desired upon their move to Montgomery County.

Similarly, the parents references to Sacramento v. Holland, 14 F.3d 1398 (9th Cir. 1994) cert. denied, 114 S. Ct. 2679 (1994), Lee v. Biloxi School District, 963 F.2d 837, 839 (5th Cir. 1992) and the other cited cases do not further their claim that this case is capable of repetition yet evading review. The Hartmanns have cited no cases which hold that there can be an ongoing controversy where there has been a change in residence followed by receipt of the exact services which the parents are seeking in the new public school program. In other words, the very fact that Mrs. Hartmann relocated to Montgomery County, Virginia, where it is conceded that Mark has been receiving a free appropriate public education now for three and a half years, moots this case. There is no controversy over the education services that Mark has received since the relocation to Montgomery County. Thus, the Hartmanns' continuing effort to seek review of a May, 1994 IEP years after the fact when Mark admittedly received appropriate services free of charge in the intervening years makes this case

moot. None of the cases cited by the Hartmanns address these factual situations.

B. MARK HARTMANN IS NOT A RESIDENT OF BOTH MONTGOMERY COUNTY AND LOUDOUN COUNTY.

The Hartmanns concede that Mark cannot be educated simultaneously in Montgomery County and Loudoun County. Nonetheless, they contend that Mark can receive services under the IDEA both from Loudoun and from Montgomery Counties. The fact remains that Mark cannot receive services simultaneously from both places and has not sought services from Loudoun since December, 1994. As noted in Loudoun's opening brief, a student is only entitled to receive one free appropriate public education under the IDEA. Thus, while Mark is enrolled in Montgomery County Public Schools as a resident of Montgomery County, he is not entitled to services from Loudoun.

C. THE HARTMANNS HAVE NOT SOUGHT EDUCATIONAL SERVICES FROM LOUDOUN.

The Hartmanns argue in their brief in opposition that they are seeking services from Loudoun. See Brief in Opposition pp. 8-9. This argument overlooks the fact that they have not sought to re-enroll Mark since December, 1994 in the Loudoun County Public Schools, and that

during that entire period, they have enrolled him in the Montgomery County Public Schools. The Hartmanns have not asked Loudoun to provide educational services to Mark since December, 1994. Instead they have elected to receive those services from Montgomery County. Thus, it is erroneous to assert that the Hartmanns have continued to seek educational services from Loudoun.

D. THE HARTMANNS HAVE NOT PRESENTED EQUITABLE GROUNDS TO AVOID APPLICATION OF THE MOOTNESS DOCTRINE.

The Hartmanns have argued that they should not be penalized for relocating Mark to Montgomery County, Virginia and enrolling him in the public school program there. This argument does not present equitable considerations because the Hartmanns are no different from other parents who relocate from one school division to another because they prefer the educational services available in the other locality. Parents relocate every day for this very reason. There is no equitable argument, however, where Mark has received what the parents admit to be a free appropriate public education since this relocation. They have received all that they are entitled to under the IDEA.

CONCLUSION

For the reasons stated above and in its opening brief, the Loudoun County Board of Education respectfully requests that the Conditional Cross-Petition for Writ of Certiorari be granted.

Respectfully submitted,

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